

No. 34536-0-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

SKYLER K. TODD

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Judge James Triplet

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Skyler Todd was convicted of second-degree robbery after he attempted to take a Leatherman from a Home Depot in Spokane, Washington. After Mr. Todd placed the item in his pocket and passed by the checkout stands, two men in normal clothing with no apparent authoritative identification physically grabbed Mr. Todd and wrestled to detain him. Not knowing who the men were or what they wanted, Mr. Todd physically struggled to escape their hold. At some point, the Leatherman fell to the ground, and the two men, who were actually loss prevention employees for the store, brought Mr. Todd back inside the store until police officers arrived.

Mr. Todd did not dispute that he intended to take the Leatherman. Instead, Mr. Todd contended he never used force in order to obtain the Leatherman, retain the Leatherman, or prevent or overcome resistance to the taking of the Leatherman, a critical element of second-degree robbery. He argued that any showing of force was in an effort to escape the two unknown assailants who appeared to want to “beat him up.”

But the jury was never properly instructed in this case, so a new trial is warranted. First, the jury was not properly instructed in its to-convict instruction that the jury could convict Mr. Todd if it found he used force to prevent or overcome resistance to the taking of the Leatherman.

The jury was only instructed on the irrelevant means of force in this case, that Mr. Todd used force to obtain or retain the Leatherman. The omitted element language of using force to “prevent or overcome resistance to the taking” was instead included in the definitional instruction for robbery. But this separate instruction cannot save a faulty to-convict instruction.

The jury inquired as to the missing language in its to-convict instruction, but the trial court declined to provide any additional instructions. Given the ambiguity in the verdict when considering the jury’s inquiry, along with the evidence in this case that raises doubt as to whether Mr. Todd used force to obtain, retain or overcome resistance to the taking of property, the instructional error in this case cannot be excused as harmless beyond a reasonable doubt.

The jury was also not properly instructed in this case that it must be unanimous as to its verdict when considering the alternative means of committing second-degree robbery. That is, the jury was never instructed it has to be unanimous as to whether Mr. Todd took property from the victim’s “person” as opposed to in the person’s “presence.” Likewise, the jury was not instructed that it had to be unanimous as to whether Mr. Todd used force to obtain, retain, or prevent or overcome resistance to the taking of property. Since substantial evidence does not support each alternative

means in this case, this additional constitutional, instructional error cannot be deemed harmless beyond a reasonable doubt.

Finally, in the event Mr. Todd is not the substantially prevailing party in this appeal, he preemptively objects to the imposition of costs against him. Mr. Todd has, as this Court requested, submitted a Report as to Continued Indigency in support of this request for costs to be denied.

B. ASSIGNMENTS OF ERROR

1. The court erred by purporting to include a complete to-convict instruction on the pertinent law by which the jury could convict, but then failing to include the pertinent language on the “force” element and instead instructing on language that did not apply in this case.
2. The court erred by failing to provide the jury a unanimity instruction for the alternative means of committing second-degree robbery.
3. The court erred by failing to ensure Mr. Todd received his constitutional right to a unanimous jury verdict.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the defendant was denied his constitutional right to have the jury properly instructed on and find all required elements of the offense.

- a. A required element that had to be proven in this robbery case was that Mr. Todd used force to prevent or overcome resistance to the taking of property.
- b. The jury was not properly instructed that it must find Mr. Todd used force to overcome resistance to the taking of property.
- c. The error in this case was not harmless beyond a reasonable doubt.

Issue 2: Whether Mr. Todd was denied his constitutional right to a unanimous jury verdict when the jury was not provided a unanimity instruction on the multiple means of committing robbery.

Issue 3: Whether this Court should deny costs on appeal against this indigent appellant in the event Mr. Todd is not the substantially prevailing party on review.

D. STATEMENT OF THE CASE

On September 6, 2015, Skyler Todd entered a Home Depot in north Spokane, intending to use the restroom. RP 79, 81. On his way to the restroom, Mr. Todd saw a Leatherman for sale and decided he needed one. RP 81-82; Exhibits P10, P11 (Police officer's body cam video/audio with defendant stating he was trying to steal a Leatherman.) Home Depot loss prevention officers, Brent Doan and Nathaniel Terrell (RP 143), saw Mr. Todd open a Leatherman package, discard the packaging, and put the Leatherman in his pocket. RP 153-57, 173-74, 176-77, 180-81, 199. They watched Mr. Todd until he passed the checkout stands and then confronted Mr. Todd as he was leaving the store. *Id.*

Mr. Doan and Mr. Terrell were both wearing street clothes to blend in with the customers at Home Depot. RP 149, 197. They had Home Depot badges attached to their waist bands under their shirts that were not visible while they walked the store. RP 150, 197. When they first contacted Mr. Todd, they started to yell at Mr. Todd to stop, approaching aggressively according to Mr. Todd (RP 81-82), but they were unable to

identify themselves before Mr. Todd began to run (RP 158, 219). Mr. Doan and Mr. Terrell then grabbed Mr. Todd just outside the store, and Mr. Todd struggled to get away from the two men while repeatedly asking who they were. RP 81-82, 103, 160, 206-07; Exhibit P10. Mr. Todd “shoulder-bumped” and pushed against the men while trying to get away from them, resulting in Mr. Doan’s hand being scratched, glasses bent, and his shirt torn in the scuffle. RP 84, 106-07, 159, 186, 189, 220, 225. At some point, the Leatherman fell to the ground, after which a Home Depot employee retrieved the item so it could be repackaged for sale. RP 208, 212, 224, 230.

Jeremy Proctor, a customer who witnessed the two men struggling to restrain Mr. Todd, testified that he approached and heard Mr. Todd repeatedly asking who the men were and why they were doing this while trying to get away from them. RP 106, 110, 111. The two men were “pretty hot”, appeared angry, and told Mr. Todd “you know why.” RP 104, 111. Mr. Doan agreed he was “jumpy” and “heated” during the confrontation. RP 187. Mr. Proctor did not know at first that the two men worked for Home Depot as they were dressed in normal street clothes. RP 101, 110. Mr. Proctor thought there was a fight going on. RP 110. But the two men told Mr. Proctor to “back the f--- away” because they were

security, and Mr. Proctor watched Mr. Todd continue to struggle hard. RP 99-101, 105, 107, 113.

Mr. Todd later told responding Spokane Police Officer Joseph Matt (RP 79-80) that he had no idea who the two men were and that he was afraid they were going to “beat him up so he was going to take off running.” RP 81-82. Mr. Todd’s mother, who arrived at Home Depot as her son was being restrained by the loss prevention officers, testified the men were aggressive and yelling, and one of them acted like he was going to hit her son with a fist. RP 234-35, 242-43, 246. Mr. Todd later pleaded with the responding officer to be charged with theft rather than robbery, saying he was simply trying to get away from the two unknown men he feared. Exhibits P10, P11; RP 81-82, 91.

In closing argument, defense counsel said there was reason to doubt the loss prevention officers’ testimony about whether a theft had occurred, particularly since the men could lose their jobs if they made a “bad stop” of a customer. RP 176, 212, 282, 286. Also, counsel argued the defendant did not use force to obtain, retain or overcome resistance to the taking of the Leatherman; rather, counsel argued, the defendant merely struggled to get away from two unknown, unidentified men who were after him. RP 285, 289-90, 292, 294. The prosecutor argued, “Force is

the moment Mr. Todd knocked Mr. Doan as he was trying to get away.”
RP 278.

As to the force element, the court’s to-convict instruction stated in pertinent part that “each of the following elements of the crime must be proved beyond a reasonable doubt:...(1) That on or about September 6, 2015, the defendant unlawfully took personal property from the person or in the presence of another... [and] (5) That force or fear was used by the defendant to obtain or retain possession of the property[.]” CP 47 (emphasis added). The instruction defining robbery stated in pertinent part, “The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking...” CP 46 (emphasis added). No unanimity instruction was given as to alternative means of committing robbery. *See* CP 38-56.

During deliberations, the jury submitted the following question regarding the force necessary to prove robbery:

On instruction #7, point 5 states, “That force or fear was used by the defendant to obtain or retain possession of the property,” yet on instruction #6 line 7, has the phrase “or to prevent or overcome resistance to the taking.” Is the phrase in #6 line 7 to be considered in our evaluation of point 5 of instruction #7?

CP 59; RP 303. The court responded, “Please review all of the information from the court carefully.” CP 59; RP 306.

The jury then found Mr. Todd guilty as charged of second-degree robbery. CP 37, 57; RP 308. Mr. Todd received a standard-range sentence (CP 100-12; RP 348), and the trial court imposed only mandatory legal financial obligations on this indigent appellant (CP 107, 122-28; *see also* Declaration of Continued Indigency, filed contemporaneously with this brief). This appeal timely followed. CP 129.

E. ARGUMENT

Issue 1: Whether the defendant was denied his constitutional right to have the jury properly instructed on and find all required elements of the offense.

The jury was provided a to-convict instruction for second-degree robbery that purported to be a complete framework of the law for convicting Mr. Todd, but the to-convict instruction omitted a required element: that the force or fear used by the defendant was to “prevent or overcome resistance to the taking” of property. While the definitional instruction for robbery did include the pertinent missing language from the to-convict instruction, the constitutional infirmity in the to-convict instruction cannot be cured by forcing the jury to ferret out the necessary elements from other instructions. Also, by omitting necessary language from the to-convict instruction, the State was not held to its burden of proving second-degree robbery in this case. Ultimately, the conflicting evidence as to the purpose behind any force in this case, along with the

jury's inquiry regarding the inadequate instructions on this same issue, demonstrates that the constitutional error was not harmless, such that this case should be remanded for a new trial.

- a. A required element that had to be proven in this robbery case was that Mr. Todd used force to prevent or overcome resistance to the taking of property.

“In a criminal prosecution the State bears the burden of proving all of the elements of the crime charged.” *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004). The elements of a crime are considered the “constituent parts of a crime – usu[ally] consisting of the actus reus, mens rea, and causation...” *State v. Fisher*, 165 Wn.2d 727, 754, 202 P.3d 937 (2009). Washington “cases also identify the statutory elements of a crime as the essential elements.” *Id.*

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of force, violence, or fear of injury to that person or his property or the person or property of anyone. RCW 9A.56.190. “Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.” *Id.* A robbery is considered an ongoing offense; i.e., the “force element” of robbery is satisfied by proof that the force was used to obtain property, to retain

stolen property or to prevent or overcome resistance to the taking of property. *State v. Robinson*, 73 Wn. App. 851, 856, 872 P.2d 43 (1994) (discussing transactional view of robbery); *State v. Johnson*, 155 Wn.2d 609, 610-11, 121 P.3d 91 (2005) (explaining, force used to overcome resistance to the taking or retention of property is sufficient to prove the force element of robbery, but force used merely to effectuate an escape did not establish robbery without proving the force was used in an effort to prevent or overcome resistance to the taking).

In *State v. Thomas*, the “force element” of robbery by preventing or overcoming resistance to a taking was at issue. *State v. Thomas*, 192 Wn. App. 721, 724-27, 371 P.3d 58, *review denied*, 185 Wn.2d 1027 (2016). Specifically, the defendant had consumed a meal and attempted to leave a restaurant without paying. *Id.* at 726-27. When confronted, the defendant displayed a knife toward the employee who was trying to prevent him from leaving without paying for his meal. *Id.* The court held this was sufficient evidence of all robbery elements, including that force was used to overcome the resistance to the unlawful “taking” of the meal, affirming the conviction. *Id.* *But see Johnson*, 155 Wn.2d at 610-11 (force used to effectuate an escape after abandoning stolen property does not establish a robbery, since the force was not used to obtain the property, retain the stolen property, or overcome resistance to the taking).

The Washington Practice Series sets forth the required force element in its to-convict instruction for second-degree robbery:

Robbery – Second Degree – Elements...

To convict the defendant of the crime of robbery in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt...

...(5) That force or fear was used by the defendant [to obtain or retain possession of the property] [or] [to prevent or overcome resistance to the taking] [or] [to prevent knowledge of the taking]...

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 37.04 (4th Ed) (emphasis added). The definitional instruction for robbery mirrors the to-convict instruction to the extent it explains, “The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which case the degree of force is immaterial.” WPIC 37.50.

Force is clearly an element the State must prove in order to establish robbery, either by establishing force was used in obtaining the property, retaining the property, or to overcome resistance to the taking of property. Here, the jury’s to-convict instruction stated the following:

To convict the defendant of the crime of robbery in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

...(5) That force or fear was used by the defendant to obtain or retain possession of the property...

CP 47. Notably absent from this to-convict instruction is any mention of proving the force element by showing force was used “to prevent or overcome resistance to the taking.” WPIC 37.04. Instead, this missing language appeared in the jury’s definitional instruction on robbery, which stated, “The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which case the degree of force is immaterial.” CP 46; WPIC 37.50. The to-convict instruction only referenced “force” “used by the defendant to obtain or retain possession of the property.” CP 47.

The jury was instructed that, to convict Mr. Todd of second-degree robbery, it must find Mr. Todd used force “to obtain or retain possession of the property.” CP 47. But these two means of committing robbery were not at issue in this case. Mr. Todd did not use force to obtain the Leatherman or to retain possession of the Leatherman. Indeed, witnesses testified Mr. Todd walked passed checkout with the Leatherman without paying before there was any confrontation, let alone any use of force. This was not a case of obtaining property unlawfully through the use of force. This is also not a case about retaining unlawfully taken property by force. Mr. Todd did not retain the Leatherman. The loss prevention officers clearly indicated the Leatherman was on the ground outside the

store, and it was eventually repackaged at Home Depot for resale. Mr. Todd did not use force to retain the Leatherman; it was never retained.

Instead, the prosecutor claimed, “Force is the moment Mr. Todd knocked Mr. Doan as he was trying to get away.” RP 278. In other words, the issue in this case was whether Mr. Todd used force to prevent or overcome resistance to the taking of the property, which would explain the jury’s question to the court about whether it could consider this means when deliberating on the elements of the offense. CP 59. However, as argued below, the jury was not properly instructed in its to-convict instruction so as to consider force by resistance to the taking of property. Without a thorough and clear to-convict instruction, Mr. Todd’s conviction is constitutionally infirm.

- b. The jury was not properly instructed that it must find Mr. Todd used force to overcome resistance to the taking of property.

As a threshold matter, “both the United States and Washington constitutions require that the jury be instructed on all essential elements of the crime charged.” *State v. O’Donnel*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007) (citing *State v. Van Tuyl*, 132 Wn. App. 750, 758, 133 P.3d 955 (2006); U.S. Const. amend. VI; Wash. Const. art. I, §22). “A jury instruction which omits an essential element of a crime relieves the State of its burden of proving each element of the crime charged beyond a reasonable doubt and is a violation of due process.” *Id.* (internal citation

omitted). The omission of an element from a to-convict instruction is of sufficient constitutional magnitude to warrant review when raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); RAP 2.5(a)(3); *O'Donnel*, 142 Wn. App. at 322.

The adequacy of a challenged “to convict” jury instruction is reviewed de novo. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). The rule is that a jury must be “clearly instructed as to all the elements to which it must unanimously agree beyond a reasonable doubt...” *Mills*, 154 Wn.2d at 10. “[A]n instruction that purports to be a complete statement of the crime must in fact contain every element of the crime charged.” *Id.* at 8 (citing *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)); *O'Donnel*, 142 Wn. App. at 322. The jury has the right to regard a to-convict instruction as a complete statement of the elements of the crime charged. *Emmanuel*, 42 Wn.2d at 819. “[A] charge attempting to define the offense which does not cover material elements of the offense is necessarily misleading and prejudicial to the accused.” *Id.* at 820-21 (quoting *Croft v. State*, 158 So. 454, 455 (Fla. 1935)). Whether another jury instruction supplied the missing element is of no moment, since the to-convict instruction must clearly contain every element required to convict in that single instruction. *See id.* at 819, 821; *O'Donnel*, 142 Wn. App. at 322 (the “jury is not required to supply the

omitted element by searching the other instructions ‘to see if another element alleged in the information should have been added to those specified in [the] instruction.’”)

In other words, “jury instructions are [generally] sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.” *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). Jury instructions are generally reviewed in context as a whole. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). However, as an important exception to this general rule of viewing the instructions in context as a whole, a “reviewing court may not rely on other instructions to supply the element missing from the ‘to convict’ instruction.” *DeRyke*, 149 Wn.2d at 910. “We generally adhere to the principle that the ‘to convict’ instruction must contain all elements essential to the conviction.” *Mills*, 154 Wn.2d at 8.¹ “The ‘to convict’ instruction carries with it a special weight because the jury treats the instruction as a ‘yardstick’ by which to measure a defendant's guilt or innocence.” *Id.* at 6. “[A]

¹ As an exception to this general rule, every element need not always be listed in the to-convict instruction where the to-convict instruction has been bifurcated to avoid prejudice to the defendant from the jury considering in its initial deliberations the existence of a prior conviction that might elevate the offense from a misdemeanor to a felony. *See e.g.*, *Mills*, 154 Wn.2d at 8, 10 (internal quotations omitted) (reasoning that the defendant’s rights were better protected by a bifurcated to-convict instruction and special verdict form on the remaining element of the existence of a prior conviction, but reaffirming the general principle that “the jury has a right to regard the ‘to convict’ instruction as a complete statement of the law and should not be required to search other instructions in order to add elements necessary for conviction.”)

defendant is denied a fair trial if ‘the jury must guess at the meaning of an essential element of the crime with which the defendant is charged, or if the jury might assume that an essential element need not be proven.’”

O’Donnel, 142 Wn. App. at 322 (internal quotation omitted).

In *State v. Mills*, the to-convict instruction did not include all of the necessary elements to convict the defendant of felony harassment, and the State sought to supplement the missing information from the to-convict instruction by relying on a separate instruction. *Mills*, 154 Wn.2d at 13-15. The *Mills* Court rejected this attempted “gap-filling” by reliance on other instructions, reversing and remanding for a new trial since the to-convict instruction did not satisfy the “requirement that all elements of the offense be clearly set forth.” *Id.* at 15.

Similarly, in *State v. Emmanuel*, the jury was provided a to-convict instruction on bribery, purporting to set forth all of the elements of the charged crime that had to be proven beyond a reasonable doubt in four separately numbered paragraphs. 42 Wn.2d at 817-19. However, one essential element of bribery was absent from the to-convict instruction. *Id.* at 817. The Court held the jury instructions were deficient. *Id.* The Court explained, “[i]t is not a sufficient answer to this assignment of error to say that the jury could have supplied the omission of this element (pendency of the applications before the land office) by reference to the other

instructions.” *Id.* at 819. The Court noted that all the pertinent law need not always be incorporated in one instruction. *Id.* However, where the judge furnishes a yardstick by which the jury is to measure the evidence to determine guilt or innocence, such as by telling the jury it may convict if it finds four certain elements have been proven beyond a reasonable doubt, the jury has the “right to regard [that to-convict instruction] as being a complete statement of the elements of the crime charged.” *Emmanuel*, 42 Wn.2d at 819. In other words, since a jury is “not required to search the other instructions to see if another element alleged in the information should have been added to those specified in [the to-convict] instruction...,” the missing element in the to-convict instruction required a new trial. *Id.* at 819, 821.

Additionally, in *State v. Ritchie*, the reviewing Court approved a to-convict instruction for robbery where it listed out the pertinent elements of establishing robbery by force, specifically that force is used to “prevent or overcome resistance to the taking.” *State v. Ritchie*, 191 Wn. App. 916, 928, 365 P.3d 770 (2015). The Court found the to-convict instruction in that case erroneous for failing to set forth the additional required element that the victim had an ownership, representative, or possessory interest in the property taken. *Id.* at 929. This instructional error resulted in *Richie*’s

robbery conviction being reversed and the matter remanded for a new trial. *Id.* at 929.

Here, the trial court purported to establish the yardstick by which the jury could determine Mr. Todd's guilt or innocence for second degree robbery by setting forth six numbered paragraphs in its "to convict" instruction. CP 47. The court did not indicate in its to-convict instruction that the jury could convict Mr. Todd if it found he committed robbery on a particular date within the State of Washington, such that the jury would naturally have been expected to rely on other instructions to supply the elements of the crime. Instead, the jury was expected to rely on the single to-convict instruction as a complete statement of the law pertinent to its determination of guilt.

In paragraph (5), the jury was instructed it had to find beyond a reasonable doubt "That force or fear was used by the defendant to obtain or retain possession of the property[.]" CP 47. Absent from this instruction is that the force used by the defendant was "to prevent or overcome resistance to the taking," which is the approved language for a to-convict instruction for second-degree robbery. WPIC 37.04; *see also Richie*, 191 Wn. App. at 928 (to-convict instruction includes that the force or fear used by the defendant was "to obtain or retain possession of the

property or to prevent or overcome resistance to the taking.”) (Emphasis added.)

Where the court purports to offer the jury a complete statement of the law as its framework for conviction, but misstates or omits a necessary consideration from the jury’s deliberations, the instructions are deficient. *Emmanuel*, 42 Wn.2d at 817-19. The to-convict instruction in this case failed to include the pertinent language that the jury may convict Mr. Todd if it found he used force “to prevent or overcome resistance to the taking” of property. CP 47; WPIC 37.04; *Richie*, 191 Wn. App. at 928. Instead, the trial court merely indicated the jury could convict Mr. Todd if it found he used force to obtain or retain unlawfully taken property.

It was crucial in this case that the jury find Mr. Todd used force to prevent or overcome resistance to the taking of property, particularly since the evidence clearly showed Mr. Todd did not retain the Leatherman and never used force to actually obtain the Leatherman. The jury even asked the trial court to clarify this issue, to no avail, seeking knowledge as to whether it could consider Mr. Todd’s use of force to prevent or overcome resistance to a taking when deciding whether to convict the defendant. CP 59. But the jury cannot be expected to supplement the purported required elements from the to-convict instruction by referencing other instructions that addressed the issue of force to overcome resistance to a taking. *Mills*,

154 Wn.2d at 13-15; CP 46. And the to-convict instruction was never corrected for the jury, despite its inquiry. CP 59.

Given that the jury was purportedly given a complete statement of the law by which to deliberate on Mr. Todd's guilt, there is no guarantee that it properly considered the essential law necessary to convict Mr. Todd of second-degree robbery – that he used force to prevent or overcome resistance to the taking. The jury was inadequately instructed, infringing on Mr. Todd's constitutional rights to have a unanimous and properly instructed jury determine his guilt.

- c. The error in this case was not harmless beyond a reasonable doubt.

Where a to-convict instruction fails to list all essential elements of the crime, the remedy is to reverse and remand for a new trial, unless the error was harmless beyond a reasonable doubt. *Richie*, 191 Wn. App. at 929; *O'Donnell*, 142 Wn. App. at 322. “[S]uch an error is harmless ‘only if the reviewing court is ‘convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error.’” *O'Donnell*, 142 Wn. App. at 322-23 (internal citations omitted). The omission of an essential element from a to-convict instruction is harmless when it is clear that it did not contribute to the verdict; for example, when uncontroverted evidence supports the omitted element.” *Richie*, 191 Wn. App. at 929. The “error is not harmless when the evidence and

instructions leave it ambiguous as to whether the jury could have convicted on improper grounds.” *Id.* (quoting *State v. Schaler*, 169 Wn.2d 274, 288, 236 P.3d 858 (2010)).

In *State v. Mills*, the Supreme Court considered whether the trial court’s failure to include all essential elements in its to-convict instruction on felony harassment (that the victim was in reasonable fear of a threat to kill being carried out) was harmless. 154 Wn.2d 15n.7. Although it was clear from the record that Mills had made a threat to kill,² the Court could not say beyond a reasonable doubt that any jury would find the victim was placed in reasonable fear of being killed (the omitted element) after hearing the harassing calls from the defendant. *Id.* The jury might have believed, based on the evidence, that the victim was only in reasonable fear of bodily injury, without necessarily considering whether the victim was placed in reasonable fear of being killed. *Id.* at 15. Therefore, the instructional error was not harmless. *Id.* at 15n.7.

This Court has also said that failure to instruct on an alternative means of committing robbery does not require reversal if the Court can

² The context of one phone message included the following: “Bi--h, you f—k-n' bi--h. I'm tired of playin' around with you. Watch, I'm going to get a year tops when I murder you're a--. I stabbed someone for messing with Bill, I got 33 days. Now watch what I'm going to get for murder. Bi--h, you think I'm f—k-n' playin'. You get the motherf--kr to my house. Bitch, you didn't wanna call me back. Yeah, I'm a show you what I'm gonna do. I'm a kill you suicide, you need to know who the f--k I am. I'm gonna kill you in the back of your head, I'm going to walk up behind you, slit your f—k-n' neck, you dumb a—bi--h. That's why I just found out what apartment you live in. Now I'm coming over now.” *Mills*, 154 Wn.2d at 5.

rely on the alternative instructed means to uphold the verdict. *O'Donnell*, 142 Wn. App. at 318. In *O'Donnell*, the to-convict instruction omitted the words “in the presence of” from the to-convict instruction, leaving the jury to only deliberate on whether the defendant used force to obtain property from the victim’s “person” rather than in the victim’s “presence.” 142 Wn. App. at 318, 323. This Court held, by omitting one of the means of committing the crime, the State assumed the burden of proving robbery by the remaining means: that the defendant unlawfully took personal property that was on or attached to the victim. *Id.* at 324. The Court explained, “By omitting the in the ‘presence’ language, the [trial] court did not omit an essential element of the crime of robbery. The court merely omitted one of the alternative means of committing the taking element.” *Id.* (internal citations omitted). Exclusion of the alternative means of taking property from another was of no consequence in that case, since the “State proved that [the defendant] took car keys from [the victim.] Thus, the alternative means of committing robbery – taking property in the presence of – was unnecessary.” *Id.* at 318.

Here, on the other hand, the court omitted the language that the forced used by the defendant was to prevent or overcome resistance to the taking, and there is not uncontroverted evidence to support the omitted means or uncontroverted evidence to support the instructed means of using

force to obtain or retain possession of the property. *See* CP 46. The omission of the “overcoming resistance” language cannot be considered harmless, since the evidence in this case was controverted and this Court is unable to guarantee that the omission did not impact the verdict.

First, there is not “uncontroverted evidence” that Mr. Todd used force to prevent or overcome resistance to the taking, the omitted language from the to-convict instruction. There is also not uncontroverted evidence that Mr. Todd used force to obtain or retain possession of unlawfully taken property, the means of committing robbery that were left before the jury. Instead, substantial evidence suggested Mr. Todd used force in a manner that was completely unrelated to the taking of any property, causing the error in this case to survive any harmless error analysis.

Officer Matt testified the defendant took off running and tried to get away from the Home Depot loss prevention officers, because he had no idea who they were, they approached him aggressively, and Mr. Todd feared they were trying to beat him up. RP 81-82, 91. There was substantial evidence that Mr. Todd was simply trying to get away from the two unknown men he feared, which would make the use of force unrelated to the taking of property. Exhibits P10, P11; RP 81-82, 91.

Mr. Doan and Mr. Terrell, the loss prevention officers, confirmed they confronted Mr. Todd while they were in normal clothing with their

identification concealed, and they never had time to identify themselves before physically grabbing Mr. Todd. RP 119, 124, 150-51, 128, 131, 133-34, 197, 206, 219. During the ensuing struggle, Mr. Todd repeatedly asked the loss prevention officers who they were, and they simply told him “You know.” RP 111, 160, 207. A reasonable jury could have determined that any use of force by the defendant under these circumstances had nothing to do with the unlawful taking of property.

A shopper’s testimony supported this theory that the defendant used force to get away from two unknown and aggressive men, rather than using force to obtain, retain or overcome the resistance to taking of property. Mr. Proctor testified he was unable to determine the loss prevention officers were associated with Home Depot, as they had no identification displayed and were dressed normally, they were “pretty hot” and acting angry, and Mr. Proctor merely believed a fight was happening. RP 101, 104, 110. A reasonable jury could have questioned whether Mr. Todd knew Mr. Doan and Mr. Terrell were persons with any authority at the store, particularly since the loss prevention officers were “jumpy” and “heated” and acted so harshly, even with Mr. Proctor when they told him impolitely to “back the f—k away.” RP 105, 107, 113. These circumstances would have suggested to a reasonable juror that it was reasonable for Mr. Todd to believe the men were not the authority figures

they claimed to be, so that the jury could have determined Mr. Todd's use of force had nothing to do with the taking of property.

This Court cannot determine from the facts of this case that no reasonable jury would find Mr. Todd's use of force was unrelated to the taking of property, since the evidence in this case would support a reasonable jury's conclusion that Mr. Todd's use of force was indeed to protect himself from harm by two unknown assailants. Alternatively, a reasonable jury could have determined that the use of force was employed in order to effectuate an escape.

After the initial use of force against Mr. Todd by the loss prevention officers, and Mr. Todd's corresponding use of force back against them, the loss prevention officers did apparently identify themselves as security after Mr. Todd repeatedly asked who they were and Mr. Proctor started to intervene. RP 105. This would have arguably gone to the issue of whether Mr. Todd used force to then overcome resistance to his earlier taking of property, property that he did not retain as it had fallen to the ground. In other words, it was critical for a jury to deliberate on whether Mr. Todd used force to prevent or overcome resistance to his earlier taking. But the omission of this important language from the to-convict instruction cannot be deemed harmless, because a reasonable jury may just as well have determined that Mr. Todd remained unsure if he was

being attacked by persons unrelated to Home Depot. Or, a reasonable jury could have determined that the ongoing force was used in order to effectuate an escape rather than overcome resistance to the taking of property (*see Johnson*, 155 Wn.2d at 610-11, explaining that the latter would support a robbery conviction, while the former would not).

In order to ignore the constitutional violation in this case, this Court must be satisfied that the error was harmless beyond a reasonable doubt based on uncontroverted evidence. But the error cannot be considered harmless beyond a reasonable doubt where the evidence is ambiguous or controverted on either the omitted means or the actual means of using force that was put before the jury. *Richie*, 191 Wn. App. at 929; *O'Donnell*, 142 Wn. App. at 322-23. The error cannot be considered harmless where a reasonable jury could have reached an alternate conclusion, as in this case. *O'Donnell*, 142 Wn. App. at 322-23. Finally, the error is not harmless where it is ambiguous whether the jury convicted on improper grounds. *Richie*, 191 Wn. App. at 929. Given the jury's essentially unanswered inquiry during its deliberations regarding the omitted language from the to-convict instruction and how it should deliberate on the force issue in this case (CP 59), it is not clear the jury properly considered the critical elements in order to convict Mr. Todd of second-degree robbery. Therefore, Mr. Todd's conviction should be

reversed and the matter remanded for a new trial. *Richie*, 191 Wn. App. at 929; *O'Donnell*, 142 Wn. App. at 322 (setting forth this remedy).

Issue 2: Whether Mr. Todd was denied his constitutional right to a unanimous jury verdict when the jury was not provided a unanimity instruction on the multiple means of committing robbery.

Mr. Todd should also receive a new trial, because the jury was not instructed that it had to be unanimous on the various means of committing robbery, and sufficient evidence does not support each means actually put before the jury. Specifically, the jury was not instructed that it had to be unanimous on whether Mr. Todd took property from “the person” or “in the presence of another,” and the evidence does not establish each of these alternative means. Likewise, there was no jury unanimity required on the means of force used, that is, whether Mr. Todd used force to obtain, to retain or to overcome resistance to the taking of property. While the evidence conflicted as to whether Mr. Todd used force to retain or overcome resistance to the taking of property, there was absolutely no evidence that Mr. Todd used force to “obtain” the Leatherman. Thus, the lack of a unanimity instruction, and the related violation of Mr. Todd’s constitutional right to a unanimous jury verdict, cannot be excused.

Criminal defendants in Washington have a right to a unanimous jury verdict. Wash. Const. art. 1, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). “[T]he right to a unanimous

verdict is derived from the fundamental constitutional right to a trial by jury and thus may be raised for the first time on appeal.” *State v. Handyside*, 42 Wn. App. 412, 415, 711 P.2d 379 (1985); *State v. Martin*, 69 Wn. App. 686, 689, 849 P.2d 1289 (1993) (Even if instructing the jury on an alternate means that is unsupported by the evidence was “plainly the result of oversight, the giving of this erroneous instruction is not trivial... and may be raised for the first time on appeal.”); RAP 2.5(a).

“The right to a unanimous jury verdict includes the right to express jury unanimity on the means by which the defendant committed the crime when alternative means are alleged.” *State v. Emery*, 161 Wn. App. 172, 198, 253 P.3d 413 (2011) (citing *Ortega-Martinez*, 124 Wn.2d at 707).

“The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury.” *Ortega-Martinez*, 124 Wn.2d at 707.

“In reviewing an alternative means case, the court must determine whether a rational trier of fact *could* have found each means of committing the crime proved beyond a reasonable doubt.” *State v. Kitchen*, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). “This requirement of sufficient evidence embodies constitutional considerations of due process.” *Martin*,

69 Wn. App. at 688 (citing *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980)).

If one or more of the alternative means is not supported by substantial evidence, the conviction will be reversed unless the court can determine the verdict was based on only one of the alternative means and that substantial evidence supported that alternative means. *State v. Rivas*, 97 Wn. App. 349, 351, 984 P.2d 432 (1999), *review denied*, 140 Wn.2d 1013 (2000), *disapproved of on other grounds by State v. Smith*, 159 Wn. 2d 778, 154 P.3d 873 (2007)). “If the instructions given and the jury’s verdict plainly show the jury must have been unanimous as to the alternative means which was supported by sufficient evidence, this court may conclude the erroneous instruction did not affect the outcome, and the error was harmless.” *Martin*, 69 Wn. App. at 689.

In *State v. O’Donnel*, this Court held there are multiple means of committing second-degree robbery. 142 Wn. App. at 323-24. There, the issue was whether the jury had been properly instructed where the to-convict instruction only referred to the defendant taking property from the victim’s person, rather than instructing on the alternative means of taking the property in the victim’s presence. *Id.* at 323. Because the evidence in that case clearly supported the instructed means, there was no error. *Id.* at 324. In reaching its decision, this Court also explained that taking

property from the “person” versus in the victim’s “presence” created “two alternative means of committing the taking element.” *Id. Accord State v. Roche*, 75 Wn. App. 500, 511, 878 P.2d 497 (1994) (“robbery can be committed by two alternative means: (1) taking property ‘from the person of another’ or (2) taking property ‘in his presence.’”)

Here, the jury was not provided an instruction that it must be unanimous in its verdict as to the multiple means of committing robbery that were put before it. *See* CP 38-56. Thus, the question becomes whether substantial evidence supports each of the means offered to the jury for consideration, that is, whether a rational juror could have found each means offered to it for consideration beyond a reasonable doubt based on the evidence presented. *Ortega-Martinez*, 124 Wn.2d at 707; *Kitchen*, 110 Wn.2d at 410-11.

In this case, there was no evidence Mr. Todd ever took the Leatherman from the person of another. This means of committing robbery was entirely unsupported. The uncontroverted evidence was that Mr. Todd removed the Leatherman from a store shelf, removed it from its packaging, and immediately placed it in his own pocket. RP 153-54, 180-81, 199, 214-15. No rational juror could have found from the evidence in this case that Mr. Todd took personal property from the person of another.

The lack of a unanimity instruction for these multiple means of committing robbery cannot be excused.

Mr. Todd further contends that he was denied his constitutional right to unanimity as to whether his use of force was to obtain, retain or overcome resistance to the taking of property. As noted above, the evidence was conflicted as to whether the defendant used force to retain or overcome resistance to the taking of property. But there was absolutely no evidence Mr. Todd used force to obtain the Leatherman. There was no physical contact with anyone until after the Leatherman was unlawfully obtained. Substantial evidence does not support this alternative means of committing the force element of robbery –that force was used to obtain the Leatherman.

Finally, the lack of a unanimity instruction cannot be excused where there is no guarantee, based on the record, that the jury returned a unanimous verdict on any one particular means. The jury’s inquiry to the court clearly demonstrates that there was potential ambiguity or division among the jurors as to which means of force may have supported a conviction in this case. *See* CP 59 (jury grappling with whether it could consider force used to “prevent or overcome resistance to a taking,” or just force to obtain or retain possession of the property in order to find the defendant guilty). The lack of a unanimity instruction deprived Mr. Todd

of his constitutional right to a guaranteed unanimous jury verdict, such that this matter should be reversed and remanded for a new trial.

Issue 3: Whether this Court should deny costs on appeal against this indigent appellant in the event Mr. Todd is not the substantially prevailing party on review.

Mr. Todd preemptively objects to any appellate costs should the State prevail on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612 (2016), and pursuant to this Court's General Court Order issued on June 10, 2016.

Mr. Todd was found indigent by the trial court after demonstrating that he had no property or income. CP 122-28. According to his Report as to Continued Indigency, contemporaneously filed with this opening brief pursuant to this Court's General Order dated June 10, 2016, Mr. Todd remains indigent and unable to pay costs that may be imposed on appeal. He owns no real property, owns no personal belongings, has no income from any source, owes \$10,000 in legal financial obligations (LFOs), and is unable to contribute any more than \$25 total toward costs if awarded to the State. *See* Appellant's Report as to Continued Indigency. The imposition of costs under these circumstances would be inconsistent with those principles enumerated in *Blazina*. *See State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015).

In *Blazina*, our Supreme Court recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, this Court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Blazina*, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to move on with their lives in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court’s reasoning not to require the same particularized inquiry before imposing costs on

appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, Mr. Todd has demonstrated his indigency and inability to pay costs.

In addition, the prior rationale in *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of *Blazina*. The *Blank* court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed, because ability to pay would be considered at the time the State attempted to collect the costs. *Blank*, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for *Blazina*'s recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. *Blazina*, 344 P.3d at 684; *see also* RCW 10.82.090(1) (“[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments.”). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); *State v. Mahone*, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion

for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). Expecting indigent defendants to shield themselves from the State’s collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The *Blazina* Court also expressly rejected the State’s ripeness claim that “the proper time to challenge the imposition of an LFO arises when the State seeks to collect.” *Blazina*, 182 Wn.2d at 832, n.1.

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court said, “if someone does meet the GR 34(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839.

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e). “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this Court to

“seriously question” an indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839. After viewing Mr. Todd’s Report as to Continued Indigency, it is clear his inability to pay LFOs has not changed since the trial court found him indigency just prior to filing his notice of appeal to this Court.

This Court has discretion to deny appellate costs. RCW 10.73.160(1) states the “supreme court . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). *Blank*, too, recognized appellate courts have discretion to deny the State’s requests for costs. *Blank*, 131 Wn.2d at 252-53.

The record demonstrates Mr. Todd does not have the ability to pay costs on appeal. He was found indigent by the trial court and remains indigent. The trial court only imposed mandatory LFOs (CP 107), and did not make the thorough, particularized inquiry into the defendant’s ability to pay other LFOs at sentencing. *See* RP 322-348. Given Mr. Todd’s ongoing indigency, he respectfully requests this Court to exercise its discretion to deny an award of appellate costs in this case, in the event the State substantially prevails on appeal.

F. **CONCLUSION**

Based on the foregoing, Mr. Todd respectfully requests that his conviction be reversed and remanded for a new trial. Upon retrial, if any, the jury should be properly instructed on the pertinent elements of the offense and the requirement that it return a unanimous jury verdict on the particular means of robbery supporting any guilty finding. Finally, Mr. Todd requests this Court deny the imposition of costs against him on appeal, in the event the State is the substantially prevailing party on review.

Respectfully submitted this 16th day of December, 2016.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON) COA No. 34536-0-III
Plaintiff/Respondent)
vs.) Spokane Co. No. 15-1-03437-6
)
SKYLER K. TODD) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on December 16, 2016, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Skyler K. Todd, DOC No. 897685
Washington Corrections Center
2321 West Dayton Airport Road
PO Box 900
Shelton, WA 98584

Having obtained prior permission, I also served a copy of the same by email on the Spokane County Prosecutor's Office at scpaappeals@spokanecounty.org.

Dated this 16th day of December, 2016.

/s/ Kristina M. Nichols
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IN THE COURT OF APPEALS
IN AND FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON) COA No. 34536-0-III
Plaintiff/Respondent)
vs.) Spokane Co. No. 15-1-03437-6
)
SKYLER K. TODD) STATEMENT OF ADDITIONAL
) AUTHORITIES
Defendant/Appellant)
_____)

Pursuant to RAP 10.8, Appellant Skyler K. Todd respectfully offers the following additional authorities for the issue of whether the Appellant was denied his constitutional right to a unanimous jury on the multiple means of committing robbery:

State v. Armstrong, No. 93119-4, 2017 WL 1959138, at *5 (Wash. May 11, 2017) (holding that “[w]hen there is insufficient evidence to support one of the alternative means charged and the jury does not specify that it unanimously agreed on the other alternative, we are faced with the danger that the jury rested its verdict on an invalid ground . . . [and] the conviction must be reversed.”).

State v. Woodlyn, 392 P.3d 1062, 1067 (Wash. 2017) (rejecting a harmless error approach that “a complete *lack* of evidence for one alternative allows courts to ‘rule out’ the possibility that any member of the jury relied on the factually unsupported means[,]” and instead requiring “some form of colloquy or explicit instruction[.]”).

Dated this 24th day of May, 2017.

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COURT OF APPEALS
DIVISION III
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SKYLER K. TODD) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Kristina Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on May 24, 2017, having obtained prior permission from Spokane County Prosecutor's Office, I served the Respondent by e-mail at scpaappeals@spokanecounty.org with a copy of the attached document using Division III's e-service feature.

Dated this 24th day of May, 2017.

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